No. 22000

In the United States Court of Appeals For the Ninth Circuit

FRUIT INDUSTRIES RESEARCH FOUNDATION, d/b/a FOOD INDUSTRIES RESEARCH & ENGINEERING,
Appellant

vs.

THE NATIONAL CASH REGISTER COMPANY,
Appellee

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

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The argument in appellee's brief, like the trial court's decision, might perhaps be appropriate, even though unsound, if this were a nonjury trial of an equity suit for rescission, or as an argument to the jury. But the same overlooks entirely the important undisputed fact that *this was a trial by jury.* If there was substantial evidence making a prima-facie case for the plaintiff—and here there undoubtedly was—the plaintiff-appellant cannot be lawfully deprived of its right to jury trial under both the Federal and State Constitutions.

None of the cases cited by appellee involves a situa-

tion such as we have in the instant case, namely the problem of whether the case should have been submitted to the jury. *Practically all of them were trials without a jury.* Consequently, they have no application whatever to the issues involved in this appeal.

The trial court made this same error in deciding it as though it were a nonjury case (R. 586-8).

ISSUE A

Appellee incorrectly asserts (p. 3) that Phillip Fluaitt was "the principal officer of the appellant" as to these transactions. Although, as office manager, he was the first one contacted by Rasmussen, actually Earl W. Carlsen, the president and managing director, and D. Loyd Hunter, the secretary and chief engineer, they being the two principal stockholders, directors and officers of the appellant, were the principal officers with whom Rasmussen dealt. It is undisputed that Carlsen, as head of the company, made the final decision to purchase (R. 384, 393-4).

It is also well to bear in mind what we are *not* claiming. During these sale negotiations Rasmussen prepared and delivered to appellant certain typewritten documents showing that appellant with this machine would have net profits in its data processing department of more than $8,000.00 per annum (Ptf. Ex. 1). These, of course, have a material bearing as corroborating the oral testimony as to his misrepresentations. However, we are not claiming and have never claimed that Rasmussen made a definite "guarantee" that ap-

pellant through the use of this equipment would realize profits in any definite stated amount. Nor are we claiming that Rasmussen made definite misrepresentations as to the specific defects of this equipment, aside from his assurances that its relatively slow print-out rate was not important and had no practical signficance. We proved the existence of those defects in order to prove the falsity of his representations and the reasons for such falsity. The misrepresentation was that this equipment was in all respects suitable, adequate and appropriate for service bureau data processing and computer work. This representation was false because as stated on page 7 of our opening brief: (1) the in-put reading rate was too slow; (2) the print-out rate was too slow (only one letter like a fast typewriter, or twelve numerical digits at a time); (3) it was inadequate for doing alphabetical work, which was essential for that purpose; and (4) the memory core, consisting of only 200 cells, was wholly inadequate for such purpose.

Consequently when appellee makes the fallacious contention (p. 3-5, 14-18) that it should prevail and that appellant was not entitled to have the case submitted to the jury because of a witness's admission that there was no specific "guarantee" of profits in any definite amount and that there was not a specific misrepresentation as to the definite defects in the equipment, obviously appellee is completely missing the point

of this litigation. Those admissions clearly have no material bearing whatever on this appeal.

Moreover denial by Rasmussen (Br. p. 5, 10) of portions of our testimony is immaterial on these issues, but on the contrary substantiates our position that these were to a great extent *disputed issues of fact* on which reasonable minds might differ, and which consequently should have been submitted to the jury for determination.

Fluaitt testified that in the demonstration of the machine at appellee's headquarters at Dayton, Ohio, there was on one occasion a temporary breakdown of the machine, but certainly this does not establish, as appellee claims (p. 4) that appellant purchased the machine with knowledge of the falsity of the representations.

As pointed out on page 8 of our opening brief, the evidence establishes that this NCR 390 equipment is not used anywhere by any service bureau. Rasmussen did not dispute this.

Appellee correctly concedes (p. 12), as did the trial court (R. 507), that "this is a diversity case and that the law of Washington governs". However appellee then states that it was the province of the trial court to determine whether appellant's case was established by clear, cogent and convincing evidence or inference therefrom. But the law of Washington is directly to the contrary. It is well settled that where substantial evidence is introduced, it is the *function of the jury* and

not the judge to *weigh the evidence* and determine whether the required degree of proof has been introduced.

"The jury is *the sole judge* of the credibility and *weight of the evidence.*" *Arthurs v. National Postal Transport Ass'n*, 49 Wn. 2d 570, 304 P. 2d 685; *Colagrossi v. Hendrickson*, 50 Wn. 2d 266, 310 P. 2d 1072. (All italics herein are ours.)

State v. Zorich, 72 W. D. 2d 31, 431 P. 2d 584 (1967) was a criminal prosecution for grand larceny committed by fraudulent representations. In criminal cases, of course, the plaintiff must establish guilt by proof beyond a reasonable doubt—a much higher degree of proof than in a civil fraud action. Nevertheless, the Washington Supreme Court in affirming the conviction held that even in such a case "substantial evidence" was sufficient to require submission of the case to the jury, saying:

> "In our consideration of this contention, we are guided by the decisions of this court that *the jury is the sole and exclusive judge of the evidence and the weight* and credibility of the witnesses, and that *this court will not reverse if there is substantial evidence to support the jury's findings.* State v. Mickens, 61 Wn. 2d 83, 377 P. 2d 240 (1962) . . . However, *the false representations need not be the sole means of inducing* the defrauded person to part with his money, but *it is sufficient if such representation was believed and relied upon by such person and in some measure operated to induce him to part with his property.* State v. Cooke, 59 Wn. 2d 804, 371 P. 2d 39 (1962); State v. Peterson, 190 Wash. 668, 70 P. 2d 306 (1937)."

The court therein concluded:

> "Reasonable minds could draw different conclusions from the evidence, hence this question became one for the jury to resolve.
>
> "Investigations on the part of a victim are facts relevant to the issue of reliance in a criminal case of larceny by false representations. Reliance is a factual question for the determination of the jury. In the present case, Standard Discount's investigations were not conclusive on the issue of reliance, but were facts for the jury to weigh in determining such issue."

In *State v. Jackson*, 72 W. D. 2d 49, 431 P. 2d 615, a criminal kidnaping case, in affirming the conviction, the Washington court said:

> "In reviewing a criminal conviction, we do not say that a court of appeals is completely devoid of power to examine the record and ascertain therefrom if the evidence in sum proves a crime and that the defendant committed it. There must be some small interstice left for the intervention of appellate jurisdiction where, despite a verdict of conviction, the whole record does not prove a crime or defendant guilty. But, notwithstanding this reservation of appellate power, the verdict of the jury *remains paramount. Where there is substantial evidence to prove a crime and the defendant's commission of it, the jury is the sole and exclusive judge of the evidence and its verdict is conclusive as to the facts.* State v. Davis, 53 Wn. 2d 387, 333 P. 2d 1089 (1959)."

That being the law in Washington in criminal cases where guilt must be proved beyond a reasonable doubt, manifestly the same rule applies and the weight of the evidence is for the jury in a civil fraud case. See the authorities cited in our opening brief.

Proof beyond a reasonable doubt, required in crimi-

nal cases, is not necessary in civil fraud actions. See *Bland v. Mentor*, 63 Wn. 2d 150, 385 P. 2d 727, quoted on page 30 of our opening brief. See also pages 117, 385 and 388 of Washington Pattern Jury Instructions (Vol. 6 Washington Practice, published by West Publishing Co.)

Moreover in any event, as pointed out in our opening brief, here there was proof of fraud by clear, cogent and convincing evidence.

Appellee rightly concedes (p. 14) that through Rasmussen it did make the representation to appellant during these sale negotiations that this machine was suitable and adequate for service bureau work and was sold for that purpose. Likewise the trial court in his decision found that this representation was made and that it was false (R. 508-514, 520).

Rummer v. Throop, 38 Wn. 2d 624, 231 P. 2d 313, and other Washington cases cited at pages 19 to 31 of our opening brief clearly go much further than appellee contends (p. 27). They do not merely hold that dissuasion from further inquiry by one who has a suspicion is actionable. The law of Washington is definitely established and well settled by these authorities that where a prospective purchaser has partial knowledge of certain defects of the property, but he is assured by the seller, who has superior knowledge, that such defects have no practical significance, importance or effect, the seller's misrepresentations are actionable. This principle is clearly determinative of this appeal.

As this court held in *Continental Casualty Co. v. Thompson*, 369 F. 2d 157, a diversity case, its decision was controlled by a Washington case which was "squarely in point," and the plaintiff was held entitled to recover. The same is true here based on numerous Washington cases which are squarely in point.

Clearly in the cases we cited there was more than a mere suspicion. For example, Miraldi actually saw the alkali on the surface of the ranch. Rummer actually saw the large magnesium plant adjacent to the ranch and was informed and warned by a relative as to its detrimental effects. Nevertheless each of them recovered for fraudulent misrepresentations.

Appellee contends (p. 28) that these parties had "equal knowledge" concerning this highly complicated equipment. Manifestly that is not correct, and the whole foundation of appellee's argument fails. The record citations on page 6 of our opening brief clearly establish that appellant's officers had little or no previous knowledge as to this NCR 390 equipment. On the other hand the same was manufactured and sold by appellee, and its representatives should have had and actually had full knowledge with reference to its capacities or lack of capacities.

Appellee states (p. 29) we failed to show reliance upon its misrepresentations. Such reliance, however, is clearly established by the positive testimony of each of appellant's three officers cited on page 6 of our opening brief.

Appellee is not relying upon any case tried with a jury. Appellee principally relies upon two cases, *Puget Sound National Bank v. McMahon*, 53 Wn. 2d 51, 330 P. 2d 559 (p. 29), and *Shook v. Scott*, 56 Wn. 2d 351, 353 P. 2d 431 (p. 32). However one of the conclusive distinctions is that (except for an "advisory jury" in Shook, which is actually meaningless and is not controlling) each of these cases was an equity suit for rescission of a purchase contract and consequently was tried by the court *without a jury.*

It is well settled that there is no right of jury trial in an equity suit for rescission. *Vickerman v. Kapp*, 167 Wash. 464, 9 P. 2d 793; *Main v. Western Loan & Building Co.* 167 Wash. 1, 8 P. 2d 281.

Moreover each of these cases is clearly distinguishable on its facts. In Puget it was obvious to the purchaser, who was extremely experienced and skillful in dealing with similar properties, that the building in question was apparently so old and dilapidated that the seller's representations could not possibly be true. There were no reassurances by the seller such as would make applicable the *Rummer* principle relied upon by us. The case clearly has no application to the instant case.

Shook, an equity suit for rescission, was a border-line five-to-four decision. There was no misrepresentation as to the capacity of the well to produce sufficient irrigation water. The defendant seller always had sufficient water. The plaintiff purchaser of the ranch in-

stalled an irrigation sprinkler system, and he had sufficient irrigation water the first year. Thereafter, a third party who had in the meantime purchased the well wrongfully shut off plaintiff's irrigation water. The majority of the court distinguished several Washington cases where there was a misrepresentation as to the adequacy of the water supply, and held that plaintiff had no right to rescind his contract in equity because whether sufficient water would be made available to him in the future depended upon the known terms of the contract with a third party and its future performance by the latter. The *Shook* case was distinguished by the trial court in his decision (R. 518-522). In so doing he ably pointed out:

> "Here, the adequacy of this machine to handle Birdseye's account *didn't depend upon any future act. It was adequate at the time he made the representation or it wasn't.*" (R. 519)

This case comes squarely within the following statement in the *Shook* majority opinion:

> "On the other hand, a statement is one of existing fact if a quality is asserted which inheres in the article or thing about which the representation is made so that, at the time the representation is made, the quality may be said to exist independently of future acts or performances of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer. In Nyquist v. Foster, supra, we held that a statement by a dealer to a prospective buyer of an automobile trailer that its sidewalls would not warp, related to a then existing condition which inhered in the material at the time the statement

was made, and it was therefore a representation of existing fact upon which fraud might pe predicated."

See also *Nyquist v. Foster*, 44 Wn. 2d 465, 268 P. 2d 442, therein cited, and *Holland Furnace Co. v. Korth*, 43 Wn. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166, and the cases therein cited, which strongly support our position herein. See also the *Shook* dissenting opinion of four judges and the authorities therein cited.

In *A.B.C. Packard, Inc. v. General Motors Corp.*, 275 F. 2d 63, there was a judgment based upon *a verdict of the jury* in favor of the defendant, and the court held that the case was properly submitted to the jury. Actually therefore it is an authority which supports our position.

Asheim v. Pigeon Hole Parking, Inc., 283 F. 2d 288, (1) was a case tried *without a jury* and (2) was based on a letter from defendant's patent attorney stating his *legal opinion* as to the validity and scope of a patent. For both of those reasons the case is clearly distinguishable.

All of the Washington cases cited by appellee (p. 30) were tried *without a jury;* and in each of them the trial court as the trier of the facts disbelieved the plaintiff's testimony.

Fluaitt's partial knowledge as to the print-out rate in any event would not be imputed to appellant because such knowledge was *not* acquired in the course of his employment. Consequently the cases cited by appellee

on ages 18 and 29 are clearly distinguishable. As stated in 3 C.J.S. 197, sec. 264:

> *"A principal is not affected with knowledge which the agent acquires while not acting in the course of his employment."*

See also to the same effect: *Citizen's Casualty Co. v. Jones* (10 Cir.) 238 F. 2d 369, cert. denied, 352 U. S. 103; *Schram v. Burt*, (6 Cir.) 111 F. 2d 557; *Higgins v. Shenango Pottery Co.*, (3 Cir.) 256 F. 2d 504; *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662.

As stated in *Rocky Mountain Fire & Casualty Co. v. Rose*, 62 Wn. 2d 896, 385 P. 2d 45:

> "The knowledge which an agent *acquires while acting as such* and within the scope of his authority is imputed to his principal."

The trial court therefore clearly erred in dismissing and refusing to submit the case to the jury as to Issue (A).

ISSUE (B)

Most of the foregoing argument is also directly applicable to this issue and need not be repeated here.

Appellant's evidence established that Rasmussen, as an inducement for the purchase, repeatedly and definitely represented and promised to appellant's representatives that appellee, through its sales staff of 27 men in the area, would procure sufficient customers and patronage for appellant so that it could operate a successful service bureau business using this equipment, and that it would not be necessary for appellant to

have any sales staff of its own for this purpose.

The facts (1) that he made such a representation and (2) that the same was made with no intention of performing the same were clearly proven by the evidence, as shown in our opening brief, and were manifestly questions of fact for determination by the jury.

None of the cases cited by appellee (p. 35) involved this legal principle upon which we rely. As shown on page 35 of our opening brief the Washington Supreme Court has repeatedly referred to this as "*an exception as well established as the rule itself.*" Consequently it seems absurd for appellee to cite cases where neither the plaintiff nor the court relied upon this well settled exception. For example, in the case principally relied upon by appellee, *Shook v. Scott*, 56 Wn. 2d 351, 353 P. 2d 431, *supra*, the court said:

> "If the guaranty was construed as a promise on the part of the seller to furnish irrigation water, the court said, it could not be the basis of an action of fraud *unless there was proof that it was made with no intention of keeping it.* (*There is in this case no contention that the fraud of the defendant was in making a promise which he had no intention of keeping.*) . . .
>
> "Also, in Mid-Continent Life Ins. Co. v. Pendleton, (Tex. Civ. App.) 202 S.W. 769, a representation made by a seller of land that water would be on the land in sixty days was held non-actionable *in the absence of an allegation and proof that the "promise" was made with the fraudulent intent of not keeping it.*"

This legal principle *was not* relied upon in *Shook* or

any of the other cases cited by appellee. *It is* definitely the basis of our contention herein as to this issue.

Schlaadt v. Zimmerman, 206 F. 2d 782, was tried *without a jury,* being an action in equity for specific performance, and the court dismissed the action on the ground of the statute of frauds. This legal principle was not mentioned, and the case clearly has no application here.

CONCLUSION

We therefore respectfully submit that as to both issues (A) and (B) hereinabove mentioned appellant established a sufficient prima facie case, and the court erred in discharging the jury and dismissing the action as a matter of law.

Respectfully submitted,

ELWOOD HUTCHESON
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

ELWOOD HUTCHESON
Attorney